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Sitti Badriyah Shaik Abu Bakar v Dr Hamzah Darus & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–153 OF 2003
ZALEHA ZAHARI, HELILIAH AND KN SEGARA JJCA
31 OCTOBER 2008

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Labour Law — Employment — Termination of employment — Notice of termination issued after show cause letter — Whether notice of termination was null and void — Whether respondents had waived contractual right to terminate employment when they issued show cause letter — Whether inquiry ought to be held before decision to terminate was taken

D

The plaintiff/appellant ('the appellant') was employed from 2 December 1992 as a deputy registrar by the second respondent, a college. At all material times, the first respondent was the principal and registrar of the second
E respondent college. In 1997, when the appellant was on medical leave for a total period of 40 days the respondents, by letter dated 15 December 1997, suspended the appellant without pay pending a full medical report from their panel doctor. However, on 16 January 1998, the respondents withdrew their letter of suspension and issued a show cause letter against the appellant in
F respect of her actions which were allegedly against the expresses and/or implied terms of her employment. According to the show cause letter the appellant had, inter alia, wrongfully retained possession of a resignation letter tendered by an employee of the second respondent from 15 November 1997, failed to notify the first respondent about the letter of resignation despite
G having the opportunity to do so and given false passwords to the second respondent resulting in the denial of access to the computer network. The appellant did not report for duty after being served with the show cause letter but in her reply to the respondents' show cause letter she denied possession of the letter of resignation and of all matters alleged in the show cause letter.
H Clause 11 of the contract of employment between the appellant and the second respondent gave either party to the contract the right to terminate the contract. On 27 March 1998, the respondents, in reliance on this clause, gave the appellant three months notice of their intention to terminate her services. The appellant thereafter filed a writ against the respondents wherein she
I applied for a declaratory order that the notice of termination issued by the second respondent was null and void. The appellant submitted that when the respondents issued the show cause letter to the appellant they raised a legitimate expectation that the appellant would be accorded procedural fairness consistent with the principles of natural justice and afforded the fair

opportunity to state her case before any decision was made. Therefore she argued that an inquiry ought to have been held and disciplinary proceedings instituted before a decision was taken to terminate the contract of employment. The respondents' case was that the relationship between the parties was contractual conferring upon either party the right to terminate the contract by giving the other three months notice and that therefore the notice of termination issued was lawful. The judge held that the appellant's employment was validly terminated and hence this appeal. The main issue for determination was whether the respondents had waived their contractual right under cl 11 of the contract of employment when they issued a show cause letter.

Held, dismissing the appeal with costs:

On the facts of this case the respondents had the contractual right, as conferred under cl 11 of the contract of employment, to terminate the appellant's services by giving her three months notice, regardless of whether she had misconducted herself or not. Therefore, the fact that there were earlier allegations of misconduct and/or indiscipline made against the appellant did not preclude the respondents from exercising their contractual right to terminate her employment. The decision to terminate the appellant was probably made to save the appellant from the humiliation of a dismissal and in accordance with the conditions of her appointment which she had agreed to on accepting such appointment. As such, the trial judge had not erred in dismissing the appellant's claim (see paras 15–16).

[Bahasa Malaysia summary

Plaintif/perayu ('perayu') telah diambil kerja dari 2 Disember 1992 sebagai timbalan pendaftar oleh responden kedua, sebuah kolej. Pada setiap masa yang material, responden pertama adalah prinsipal dan pendaftar kolej responden kedua. Pada 1997, semasa perayu sedang dalam cuti sakit untuk tempoh keseluruhan 40 hari, responden-responden melalui surat bertarikh 15 Disember 1997, telah menggantung tugas perayu tanpa gaji sementara menunggu laporan perubatan lengkap daripada doktor panel mereka. Walau bagaimanapun, pada 16 Januari 1998, responden telah menarik balik surat penggantungan tugas mereka dan mengeluarkan satu surat tunjuk sebab terhadap perayu berkenaan dengan tindakannya yang mana didakwa telah melanggar terma-terma pekerjaannya yang jelas dan/atau tersirat. Menurut surat tunjuk sebab tersebut, perayu telah, antara lain, secara salah menyimpan dalam milikannya surat perletakan jawatan yang diserahkan oleh pekerja responden kedua dari 15 November 1997, telah gagal untuk memberitahu responden pertama berkenaan dengan surat perletakan jawatan tersebut walaupun mempunyai peluang untuk melakukannya dan memberikan kata

laluan yang salah kepada responden kedua yang menyebabkan penolakan akses kepada rangkaian komputer. Perayu tidak melaporkan diri untuk bertugas selepas disampaikan dengan surat tunjuk sebab tetapi dalam jawapannya kepada surat tunjuk sebab responden tersebut perayu menafikan penyimpanan surat perletakan jawatan dan kesemua perkara yang didakwa di dalam surat tunjuk sebab. Klausa 11 kontrak pekerjaan di antara perayu dengan responden kedua memberikan kedua-dua pihak terhadap kontrak tersebut hak untuk menamatkan kontrak. Pada 27 Mac 1998, responden, berdasarkan kepada klausa ini, memberikan perayu tiga bulan notis berkenaan dengan niat mereka untuk menamatkan perkhidmatan perayu. Perayu kemudiannya telah memfailkan writ terhadap responden-responden yang mana di dalamnya perayu memohon perintah deklarasi bahawa notis penamatan yang dikeluarkan oleh responden kedua adalah terbatal dan tidak sah. Perayu menghujahkan bahawa apabila responden mengeluarkan surat tunjuk sebab kepada perayu mereka telah membangkitkan jangkaan yang sah bahawa perayu mestilah diberikan keadilan prosedur selaras dengan prinsip keadilan asasi dan diberikan peluang yang saksama untuk menyatakan kesnya sebelum apa-apa keputusan dibuat. Oleh itu perayu mengatakan bahawa satu siasatan seharusnya diadakan dan prosiding disiplin dimulakan sebelum satu keputusan diambil untuk menamatkan kontrak pekerjaan. Kes responden-responden adalah bahawa hubungan di antara pihak-pihak adalah bersifat kontraktual yang diberikan kepada mana-mana pihak, hak untuk menamatkan kontrak dengan memberikan notis selama tiga bulan dan oleh itu notis penamatan adalah sah. Hakim telah memutuskan bahawa pekerjaan perayu telah ditamatkan secara sah dan maka rayuan ini. Isu utama untuk ditentukan adalah sama ada responden-responden telah mengetepikan hak kontraktual di bawah klausa 11 kontrak pekerjaan apabila mereka mengeluarkan surat tunjuk sebab.

Diputuskan, menolak rayuan dengan kos:

Berdasarkan fakta kes ini, responden-responden mempunyai hak kontraktual seperti mana yang diberikan di bawah klausa 11 kontrak pekerjaan, untuk menamatkan perkhidmatan perayu dengan memberikan notis selama tiga bulan, tanpa mengira sama ada perayu telah melakukan salah laku atau tidak. Oleh itu, fakta bahawa terdapat dakwaan awal salah laku dan/atau tidak berdisiplin yang dibuat terhadap perayu tidak menghalang responden-responden daripada melaksanakan hak kontraktual mereka untuk menamatkan pekerjaan perayu. Keputusan untuk memberhentikan perayu adalah dibuat berkemungkinan untuk menyelamatkan perayu daripada pemecatan yang memalukan dan berdasarkan syarat perlantikan perayu yang mana perayu telah setuju menerima perlantikan tersebut. Oleh itu, hakim bicara tidak melakukan kesilapan di dalam menolak tuntutan perayu (lihat perenggan 15–16).]

Notes

For cases on termination of employment, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1161–1239.

Cases referred to

Government of Malaysia v Lionel [1974] 1 MLJ 3, PC (folld)

Appeal from: Civil Suit No 22–1016 of 1998 (MT1) (High Court, Pulau Pinang)

Karpal Singh (Ram Karpal Singh with him) (Karpal Singh & Co) for the appellant.
V Muthusamy (V Muthusamy & Associates) for the respondents.

Zaleha Zahari JCA (delivering judgment of the court):

[1] The plaintiff (appellant before us) had by writ and statement of claim filed on 4 December 1998, inter alia, applied for a declaratory order that the notice of termination dated 27 March 1998 issued by the defendants (respondents before us) is null and void and that she is still an employee of the second respondent.

[2] The High Court judge had on 17 January 2003 dismissed the plaintiff's claim with costs.

FACTS

[3] By a contract dated 2 December 1992 the appellant was engaged as the deputy registrar of Ed-Tech College (now known as International College Penang subsequently referred to as 'IPC') owned by the second respondent effective 16 December 1992 upon terms and conditions specified therein.

[4] It is not in issue that the appellant for the year 1997 was on medical leave for a total period of 40 days, inter alia, from 1 November 1997 to 13 November 1997, then, from 14 November 1997 to 20 December 1997.

[5] The record shows that the respondents had, vide letter dated 2 December 1997, requested the appellant to undergo a medical check up. The respondents then by letter dated 15 December 1997 suspended the appellant without pay with effect from 2 December 1997 pending a full medical report from their panel doctor. The appellant's response vide letter dated 19 December 1997 was to apply for one month's no pay leave, which application was approved by the respondents.

[6] A month later, vide letter dated 16 January 1998, the respondents withdrew their 15 December 1997 letter of suspension without prejudice to their rights to take disciplinary action or from issuing a show cause letter against the appellant in respect of her other actions. The letter is reproduced in extenso as follows:

16th January 1998

Cik Sitti Badriyah Shaik Abu Bakar

304 Jalan Dato' Keramat

10150 PENANG

Dear sir,

SHOW CAUSE LETTER

Firstly, we hereby withdraw our letter to you dated 15.12.97 in respect of your suspension since we have on the 18.12.97 received the Medical Report dated 15.12.97 from our panel doctor

However, the abovesaid withdrawal of our letter dated 15.12.97 is made without prejudice to our rights to take disciplinary actions(s) and or issuing show cause letter against you in respect of your other actions

The Management is of the view that you have been acting in a manner which is against the expressed and or implied terms of your employment and therefore has decided to issue you with this show cause letter to you to explain your following actions:

(1) On 17.11.97 at about 10.00 am, a telephone conversation took place between the Principal and Registrar (P&R) and Encik Jamaal Abu Bakar Bawazir (Encik Jamaal) wherein Encik Jamaal informed the P&R that he has tendered his resignation and his letter of resignation was handed to you on 15.11.97. And you had failed to notify the P&R that the said Encik Jamaal had handed over his resignation letter on 15.11.97 to you. Therefore, you had wrongfully retained possession of the said resignation letter since Encik Jamaal reports directly to the P&R.

(2) On 15.11.97, the College computer system had a total breakdown of PIETC_A, PIETC_B and PIETC_C servers which are the backbone of the computer network system. On the same day, the external gateway computer at Encik Jamaal's office and his secretary, Ms Karen Naginlal's computer were also down. You were present in your office on the 17.11.97 but had made no attempt to inform the P&R about Encik Jamaal's resignation although the P&R was in the office from 8.30 am. An on 17.11.97 about 10.30 am, you took the extended medical leave.

(3) On 26.11.97 at about 11.00 am, you have relayed to us the passwords for 'Amiga 97', 'Civic' and 'Fuzzy' despite no request was made to you. As a Deputy Registrar, it is not your duty to run the computer system and having unauthorized possession of the said computer passwords should be clarified.

(4) On 26.11.97, you gave false passwords namely 'Civic' and 'Fuzzy' to the College resulting the denial of access to the network.

(5) It is disturbing to note that several of the medical certificates and correspondences to the management are similar with the ones pertaining or forwarded by Encik Jamaal.

In view of the seriousness of the matter involved, the Management has decided to suspend you from work with immediate effect. You are not to enter the College premises, give any instructions or interfere in the management in any way whatsoever. During your suspension, however, you will be paid full wages.

In the course of your suspension, if you are found to indulge in the College operations or giving any instructions to the Management and staff of the College, further appropriate disciplinary action will be taken against you.

Should the management fail to receive a written reply within seven (7) days from the receipt hereof, the management reserves the right to take disciplinary action(s) against you without any further reference to you whatsoever.

[7] The show cause letter was served on 20 January 1998. It is common ground that the appellant did not report for duty after having been served with the show cause letter. The appellant showed cause vide letter dated 24 January 1998 which states as follows:

Dr. Hamzah Darus

Principal & Registrar

Kolej Antarabangsa

11900 Penang

Dear sir,

Re: Show Cause Letter

Your letter dated 16th January, 1998 which we received on 20th January, 1998 refers.

With regards to item (1) of the above letter, I wish to categorically deny of prosessing (sic) any of such letter.

On item (2) I have no knowledge of such resignation whatsoever and insofar as medical leave is concerned, as an employee I took my medical leave as per my eligibility.

On item (3), please refer to your letter dated 26 November, 1997 and my reply thereof.

A With regards to item (4), please check your facts carefully before casting expersions (sic) on me.

On item (5), the circumstances of our predicament are similar and hence there is no justification for you to query on this.

B I trust that the above clarification and explanation will satisfy you.

[8] We pause here to mention that cl 11 of the contract of employment entitles either party the right to terminate the agreement by giving the other three months notice. The respondents then, by letter dated 27 March 1998, C gave the appellant three months notice of their intention to terminate her services. The letter states as follows:

27th March 1998

Cik Sitti Badriyah Shaik Abu Bakar

D

304 Jalan Dato' Keramat

10150 PENANG

Dear Cik Sitti,

E NOTICE OF TERMINATION

We hereby give you three months notice with effect from 1st April, 1998, terminating your services with the company and Kolej Antarabangsa.

Kindly acknowledge receipt.

F

This effectively means that the termination of the appellant's services took effect on 1 July 1998.

[9] The appellant's case as pleaded in her statement of claim dated G 4 December 1998 was that the respondents' letter of suspension and purported termination of her employment were null and void for the following reasons: by reason of the notice of termination not stating the reason for the termination, delay between her reply and notice of termination and denial of an opportunity to mitigate. The pleaded case makes no mention H of being denied of the right to be heard, of waiver of exercise of a contractual right, nor of a legitimate expectation that an inquiry would be held prior to making a decision in respect of the misconduct alleged against her.

[10] In his submission on appeal before us the appellant's counsel, Encik I Karpal, made no reference to the grounds pleaded in para 16 of the statement of claim. The thrust of his submissions was on unpleaded issues but raised in evidence by way of witness statement on 3 September 2002. Encik Karpal argued that when the respondent issued the show cause letter to the appellant they raised a legitimate expectation that the appellant would be accorded

procedural fairness consistent with the principles of natural justice and be given a fair opportunity to state her case against the allegations made against her before any decision is made. The language used in the show cause letter contemplates the institution of disciplinary proceedings. In issuing the show cause letter demanding an explanation with a view to the institution of disciplinary proceedings, must be construed to mean that the respondents had waived their contractual right under cl 11 of the contract of employment. He argued that on the facts of this case there ought to have been an inquiry, and the disciplinary action contemplated ought to have been pursued to a finality.

[11] The respondents' case was that the relationship between the parties were contractual conferring upon either party the right to terminate the contract by giving the other three months notice. Counsel for the respondents submitted that the notice of termination was lawful in accord with the contractual provision which had been agreed upon by the parties. He stressed the fact that the appellant had, upon service of the notice of termination failed to report for duty for the full duration of the three months period as well as the fact that the appellant did not protest or challenge the termination during this period.

[12] It was further pointed out that the appellant had not asked for an enquiry and denial of being accorded one does not accordingly arise. According to the respondents' counsel the 'legitimate expectation' point raised after more than four years had elapsed was an afterthought. Further, on the facts of this case, the appellant had been given an opportunity of being heard.

DECISIONS

[13] To succeed in her action the appellant must establish that she had been dismissed. If in fact her employment was terminated in accordance with the terms of engagement, and that could be validly done and did not constitute dismissal, it is unnecessary to consider whether her dismissal was in accord with natural justice.

[14] The argument of legitimate expectation on the part of the appellant that it was incumbent upon the respondents to pursue the contemplated disciplinary action following the show cause notice by holding an enquiry, and waiver of their contractual right of termination by reason of having issued the show cause letter which the respondents did, in our considered opinion can be answered by reference to the decision of the Privy Council in *Government of Malaysia v Lionel* [1974] 1 MLJ 3. At first instance the High Court held that Lionel was not dismissed and that his was a case of

termination simpliciter in accordance with the terms and conditions of his contract of service, which decision on appeal was reversed by the Federal Court. On further appeal to the Privy Council, the Federal Court's judgment was reversed and the High Court's judgment was restored. The advise of the board delivered by Viscount Dilhorne, inter alia, states:

> In Their Lordships opinion Syed Othman J was right to distinguish between dismissal and termination of services in accordance with the terms of the engagement. And right in holding that the respondent had not been dismissed but had his services validly terminated.
>
> After the respondent had failed to exculpate himself, it was not obligatory to impose a punishment or penalty or to dismiss the respondent. His employment was terminable by one month's salary in lieu of notice and the decision to take that course may well have been due, as Syed Othman J said, to a desire to save the respondent from the ignominy of dismissal.

[15] On the facts of this case under cl 11 of the contract of employment, the respondents, are clearly conferred with the contractual right to terminate the appellant's services by giving three months notice, whether or not she had misconducted herself.

[16] Applying the principle in *Lionel*'s case, the fact that there were earlier allegations of misconduct and or indiscipline made against the appellant did not preclude the respondents from exercising their contractual right to terminate her employment. The decision to terminate the appellant's services was, as in *Lionel*'s case, probably taken to save the appellant from the ignominy of a dismissal and in accordance with the conditions of her appointment which she had agreed to on accepting such appointment. The learned trial judge did not err in dismissing the appellant's claim. He was right in finding that the appellant's employment was validly terminated in accordance with her terms of appointment.

[17] The appeal is accordingly dismissed with costs. The deposit to the respondents to account of taxed costs.

Appeal dismissed with costs.

Reported by K Nesan